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No. 90-400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PETE LE'MON,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

1. SWA Liability for Agents' Conduct 3

2. Sufficient Independent Legal Grounds Do Not Support the Decision Below 4

3. *O'Neill* Amicus 6

4. Remand Suggestion 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Page

O'Neill v. Air Line Pilots Association,
886 F.2d 1438 (5th Cir. 1989),
cert. granted, 59 U.S.L.W. 3243
(U.S. Oct. 1, 1990) (No. 89-1493) 2, 6-8

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 7

NLRB v. Pacific Intermountain Express Co.,
228 F.2d 170 (8th Cir. 1955) 4

Sheet Metal Workers v. NLRB, 293 F.2d 141
(D.C. Cir.), *cert. denied*, 368 U.S. 896 (1961) 3

United Mine Workers v. Meadow Creek Coal Co.,
263 F.2d 52 (6th Cir. 1959) 4

United Steelworkers v. Rawson,
___ U.S. ___, 110 S. Ct. 1904 (1990) 5-8

Vaca v. Sipes, 386 U.S. 171 (1967) ..... *passim*

Statutes

National Labor Relations Act

§ 8(d)(3), 29 U.S.C. §158(d)(3) 3-4, 6, 9
§ 8(d)(4), 29 U.S.C. §158(d)(4) 3

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ARGUMENT

Pete Le'Mon ("Le'Mon"), petitioner, herein replies to the Brief for the National Labor Relations Board ("NLRB"),[1] respondent. Before doing so, however, Le'Mon respectfully suggests that it would be useful to the Court to have at hand the Brief for the United States as Amicus Curiae[2] in *Air Line Pilots*

[1]Brief for the National Labor Relations Board ("NLRB Br.").

[2]Herein referred to as the "*O'Neill* Amicus."

Association v. O'Neill.[3] For if certiorari is warranted in *O'Neill* for the reasons stated in the *O'Neill* Amicus, then certiorari is even more justified in the instant case.

The NLRB Brief, as we understand it, makes three points. The first point is that the conduct of officers of the Sheet Metal Workers' International Association Local No. 49 ("SMW")[4] is to be separated from that of its attorneys in determining the SMW's liability for conduct that involved both types of agents.[5] The second NLRB point is that its decision denying relief to Le'Mon is justified on an independent ground, one not ruled upon by the Tenth Circuit.[6] And the third NLRB point is that the independent ground claimed to justify its decision, but not the decision of the Tenth Circuit, warrants remand rather than this Court's full consideration on certiorari.[7]

Le'Mon will demonstrate herein that the NLRB Brief, especially when considered with the *O'Neill* Amicus, actually shows why this case should receive the Court's fullest consideration following receipt of the parties' briefs on the merits.

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[3]*O'Neill v. Air Line Pilots Ass'n*, 886 F.2d 1438 (5th Cir. 1989), *cert. granted*, 59 U.S.L.W. 3243 (U.S. Oct. 1, 1990) (No. 89-1493).

[4]The SMW, as set out more fully in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Le'Mon Petition") at 5-8, is the respondent in charges brought before the NLRB by Le'Mon that led to the Tenth Circuit's decision for which review is here sought.

[5]NLRB Br. at n.2.

[6]*Id.* at 5-6.

[7]*Id.* at n.9.

1. SWA Liability for Agents' Conduct

The NLRB attempts to insulate the SWA from liability for the untoward acts of its agents, acts which caused Le'Mon to be discharged from employment.[8] The Court will recall that the SWA failed to file a timely "§ 8(d) notice"[9] with respect to the strike it intended to conduct against Le'Mon's employer.[10] It cannot be denied that the SWA was the "party" to the agreement with the obligation to file the § 8(d) notice, that the SWA is the respondent in the NLRB proceedings that denied Le'Mon all relief for his discharge,[11] or that the SWA, as a labor organization, is amenable to NLRB charges and appropriate relief for the unlawful acts of its officers as agents.[12] Further, it cannot be denied that the SWA, as a labor organization, is amenable to NLRB charges and appropriate relief for the unlawful acts of its

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[8]*Id.* at n.2.

[9]The term "§ 8(d) notice," found in § 8(d)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(d)(3), and which, under § 8(d)(4) of the NLRA, 29 U.S.C. § 158(d)(4), precludes a strike unless proper notice is given, refers to the notice a party wishing to modify a collective bargaining agreement must furnish to the Federal Mediation and Conciliation Service ("FMCS") at least 30 days prior to the expiration of the agreement. No one in this case disputes that the SWA failed to provide timely § 8(d) notice, that this failure resulted in Le'Mon's discharge from employment, and that, because the notice was not given, Le'Mon has no recourse against his employer for the discharge.

[10]The undisputed facts are found in the Le'Mon Petition at 3-5.

[11]See the captions to the proceedings below which appear in the Appendix to the Le'Mon Petition, namely the NLRB Complaint and Notice of Hearing (App. 42a), the NLRB Decision and Order (App. 14a), and the Judgment of the Tenth Circuit (App. 1a).

[12]*See Sheet Metal Workers v. NLRB*, 293 F.2d 141, 149 (D.C. Cir.), *cert. denied*, 368 U.S. 896 (1961).

attorneys as agents.[13] For, "it was undoubtedly the intention of Congress to apply the common law rule with respect to liability for the acts of an agent."[14] The whole thrust of common law agency principles endorsed by Congress would be cast aside by the position expressed by the NLRB Br. at 3 and accompanying text. As we understand that position, the SWA's officers (Messrs. Briggs and Gilliland) did not know that the § 8(d) notice had not timely been filed, but the SWA's attorney (Bloomfield) did know that essential fact. That set of facts does not exculpate the SWA, as the NLRB suggests. For it is not, and cannot be, the rule of the common law of agency for the principal to be exculpated because it does not immediately know what all of its agents know, or that for the principal to be liable, all of its agents must know what all of its other agents know individually. The whole of agency law, as we understand it, is the imputation of liability to the principal because of the acts or knowledge of its agents. The NLRB's position here would reverse that law in the labor law setting where it has previously been universally applied. We know of no basis for such a result, and the NLRB provides no supporting citation.[15]

2. Sufficient Independent Legal Grounds Do Not Support the Decision Below

The NLRB suggests that an independent ground, a finding of "mere negligence," supports the *result* below. In so stating, the NLRB is forced to concede that "the court [below] did not pass on the Board's conclusion that the Union conduct was not arbitrary within the meaning of *Vaca v. Sipes* [, 386 U.S. 171, 190

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[13]*NLRB v. Pacific Intermountain Express Co.*, 228 F.2d 170, 175 (8th Cir. 1955).

[14]*United Mine Workers v. Meadow Creek Coal Co.*, 263 F.2d 52, 61 (6th Cir. 1959).

[15]Neither the NLRB nor the Tenth Circuit below premised its decision on such a position.

(1967)]."[16] In other words, the NLRB asserts that the SWA's conduct was "mere negligence" and that such negligence is an insufficient ground for holding the SWA liable under the duty of fair representation.

For such a sweeping conclusion,[17] the NLRB refers us to this Court's decision in *Rawson*.[18] However, the NLRB never quotes completely from the applicable language from *Rawson*. That language is: "The courts have *in general* assumed that *mere negligence*, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation, and we endorse that view today."[19] Thus, the NLRB cannot, and does not, cite *Rawson* for a rule of universal application, for on its own terms the rule applies only to the "general case." In addition, the NLRB cannot, and does not, cite *Rawson* for a rule applying where the aggrieved party can show more than "mere negligence." Thus, on its own terms, *Rawson* cannot be cited as providing an independent ground for sustaining the *result* below, even if this Court must reverse the grounds for decision below. For the case Le'Mon presents here is *not* the general garden variety of duty of fair representation violation, and the SWA's conduct was not "mere negligence," but the failure to fulfill the mandatory duty of filing the § 8(d) notice required by statute. There is every reason, then, for this Court to grant the Le'Mon Petition, precisely to consider whether the failure to file an § 8(d) notice is more than the mere negligence

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[16]NLRB Br. at 6.

[17]*Id.* at 7.

[18]*United Steelworkers v. Rawson*, ___ U.S. ___, 110 S. Ct. 1904 (1990) (*"Rawson"*).

[19]*Id.*, ___ U.S. at ___, 110 S. Ct. at 1911 (emphasis added).

found in *Rawson* and thereby a violation of the duty of fair representation."[20]

3. *O'Neill* Amicus

In every respect, the *O'Neill* Amicus supports the granting of the Le'Mon Petition. There the Government concedes two points of significance to this Court's consideration of the issues presented here. First, the Government agrees "that a union can be held to have violated its duty of fair representation in contract negotiations by acting arbitrarily."[21] So put, the question for the Court's consideration here would be whether it is arbitrary (and therefore a violation of the duty of fair representation) for a union to fail to timely file the required § 8(d) notice. Second, the *O'Neill* Amicus concedes that it would be a violation of the duty of fair representation "if it could be shown that the right of the employees was clearly established at the time of the union's decision and if it was also clear at that time that nothing of value was received in exchange."[22] Here, of course, the "right of the employees" to have the § 8(d) notice timely filed is unquestionable, and it is clear that Le'Mon and the other employees received "nothing of value" as a result of the SWA's failure to file that notice. The position of the United States, then, contrary to the NLRB's position here, completely and totally supports both this Court's granting of the Le'Mon Petition and its granting Le'Mon relief on the merits.

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[20]The Le'Mon Petition, of course, urges this Court to hold that the failure to file the required § 8(d) notice is a *per se* violation of the duty of fair representation. It goes without saying that a lesser included question is whether the failure to file the § 8(d) notice is "gross negligence" of such severity as to justify liability outside of the general rule of *Rawson*.

[21]*O'Neill* Amicus at 8.

[22]*Id.* at 11-12.

4. Remand Suggestion

The NLRB makes two proposals for the Court's consideration of this case. Initially, it suggests that this Court "may wish to defer action on this petition until *O'Neill* has been decided."[23] Additionally, the NLRB suggests that, if this case is deferred pending *O'Neill*, "the Tenth Circuit also be directed to consider the effect of this Court's decision in *United Steelworkers of America v. Rawson, supra*."[24]

Neither suggestion has the slightest merit. The NLRB admits that "*O'Neill* does *not* directly address the rationale adopted by the Tenth Circuit in this case . . . ."[25] That is because *O'Neill* addresses the "arbitrary" prong of the duty of fair representation. The instant case, on the other hand, at least as the Tenth Circuit viewed it, does not address that prong at all, but instead turns on the supposed requirement that, in addition to everything else *Vaca* requires, including proof of arbitrary conduct, Le'Mon's case failed because he did not prove the SWA's conduct was "discriminatory."[26] Thus, this Court's resolution of *O'Neill* will not be dispositive of Le'Mon's rights in this case, and a decision in *O'Neill* will provide the Tenth Circuit with no guidance on the proper resolution of the primary issues of concern here.

Reference to *Rawson* has no better foundation. In a more candid moment, the NLRB admits that *Rawson* is among those cases which have "generally involved procedural or other issues

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[23]NLRB Br. at 11.

[24]*Id.* at n.9.

[25]*Id.* at 7-8 (emphasis added).

[26]As noted above, the United States concedes that "the Court [in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953)] surely did not imply that unions should be immune from liability for arbitrary decisions." *O'Neill* Amicus at 8.

that do *not* directly implicate the standard of conduct imposed by the duty [of fair representation]."[27]

CONCLUSION

For the foregoing reasons, Le'Mon urges this Court to grant his petition. Serious and substantial issues are raised by this case which are not presented by *O'Neill*. The instant case provides this Court with a complete and unassailable record through which to consider and decide: 1. What conduct beyond "mere negligence" violates the duty of fair representation, whether or not that conduct reaches the level of a *per se* violation; and, 2. Whether proof of union "discrimination" is a necessary element of a duty of fair representation violation, to be added to those found in *Vaca*, as the Tenth Circuit held. This Court's decision in *O'Neill* will, in all likelihood, leave serious and substantial questions of duty of fair representation law that can and should be answered here.

Ordinarily, we would not make so direct a statement as to how this Court should treat a case being briefed. However, the NLRB has interposed its view that this case should be remanded after *O'Neill*, and in light of *Rawson*.[28] It is Le'Mon's view, and one that holds out considerably more promise for justice and prompt decision on issues of major importance, that the Court should grant his certiorari petition, and schedule arguments of his case and *O'Neill* concurrently. In that way, it is respectfully suggested, the Court can consider, after the fullest briefing and argument on the merits, two significant duty of fair representation

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[27]NLRB Br. at n.8 (emphasis added).

[28]NLRB Br. at n.9.

cases which present serious issues under distinct prongs of the *Vaca* test.[29]

Respectfully submitted,

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November 21, 1990

[29]Should the Court grant certiorari, it may wish to consider whether a brief of the FMCS should be requested, in addition to the Court's receipt of the briefs of the parties in the regular course. This case directly implicates the requirement that § 8(d) notices be submitted to the FMCS, and no attorney for the FMCS is shown on the NLRB Brief in the instant case, nor does that brief state that it reflects the FMCS' views.